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**COURSE III ESSAY - ENTITLED**

**"DEPARTMENT OF DEFENSE HOMOSEXUAL POLICY:  
A BUREAUCRATIC STRUGGLE INVOLVING INTENSE EXECUTIVE AND  
CONGRESSIONAL COMPROMISE"**

by

LTC Curtis B Taylor, U. S Army

SEMINAR H, COMMITTEE 9  
DR MARY KILGOUR, SEMINAR LEADER

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## INTRODUCTION

When President Clinton announced his intention to lift the military's long-standing ban against service by homosexuals, he set off a fire storm of controversy. This decision to lift the ban placed the senior military leadership in the awkward position of publicly opposing the Commander-in-Chief<sup>1</sup>. The split in Congress was equally dramatic with influential members of the President's own party objecting to his unilateral approach to lift the ban<sup>2</sup>. Lost in all the controversy, however, was an understanding of the Department of Defense policy itself.

In his January 29, 1993, press conference, President Clinton characterized the current policy as excluding people from service based "solely on the basis of their status"<sup>3</sup>. The President added, "I believe that American citizens who want to serve their country should be able to do so unless their conduct disqualifies them from doing so"<sup>4</sup>. The Chairman of the Joint Chiefs of Staff, General Colin Powell, in defending the old policy in a letter to a member of Congress, noted that "sexual orientation is perhaps the most profound of human behavioral characteristics"<sup>5</sup>. But it was Senator Sam Nunn, the conservative Democrat, who served as the catalyst for Congressional resistance. He emphasized that "the rights of privacy of those men and women in the military who are not homosexual must be protected"<sup>6</sup>. Are the President, the General and the Senator talking about the same policy? How do these men, from two branches of government - the Executive and Legislative branches come to consensus on such an emotionally charged and politically risky policy that lies at the very heart of our instrument of National Security Policy - the Military?

This essay explores the process through which this policy was reached - Graham T Allison's Model III -- policy derived as a result of bureaucratic politics. The final policy agreed upon by the Executive and Legislative branches, by a long shot, is not a solution to the problem

but rather the result of compromise, coalition, competition, and confusion among government officials and special interest groups with significantly different perceptions, priorities, and agendas. The essay examines arguments for and against the ban, explores the politics of the compromise, assesses the impacts of the judicial rulings and culminates with some conclusions regarding the validity of the new policy.

## **BACKGROUND**

As a presidential candidate, Clinton made no secret of his plan to lift the ban on homosexuals in the military. Accordingly, shortly after winning the Presidency, he reiterated his campaign pledge to lift the ban. This pledge ended up producing an explosive clash between the social and sexual freedom sought by the homosexual community and the rigid discipline at the heart of the military culture.

Under the policy that Clinton inherited, the military could discharge through an expedited administrative process, any member found to have engaged in homosexual actions, including simply declaring his or her homosexual orientation. Additionally, specific homosexual acts prohibited by military law (Uniform Code of Military Justice), could result in court-martial or other disciplinary actions.

## **THE INITIAL COMPROMISE**

On January 30, 1993, less than three months after being elected, the President announced a compromise with conservative Democrats that bought him time. He announced a six-month delay in lifting the ban. In the meantime, actions would be suspended against gay personnel except in cases of improper conduct. The announcement followed hours of meetings, dozens of news conferences by lawmakers and thousands of phone calls to the Capitol from angry citizens. In the end, Clinton did essentially what Defense Secretary Les Aspin had recommended from the

outset But the bureaucratic process of getting there, and changes that were made in the plan, reflected the fierce resistance the administration encountered on Capitol Hill. The President directed the Secretary of Defense to develop a new policy "ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces of the United States "7 The President further directed that the policy be implemented in a manner that is "practical, realistic, and consistent with the high standards of combat effectiveness our Armed Forces must maintain."8

### **DEVELOPMENT OF THE NEW POLICY**

From the onset, Secretary Aspin had a most formidable challenge He was faced with trying to come up with a new policy to implement the Presidents guidance knowing that the Chairman, JCS and Service Chiefs adamantly opposed lifting the ban Henceforth, the bureaucratic politics began Les Aspin, the Secretary of Defense knew that he needed to support both the President and the senior military, so he served the role of mediator This was a difficult role because the President had already embarrassed the Chairman, JCS, by not consulting with him before pledging to lift the ban Additionally, the Secretary of Defense was new to the job himself and wanted to support the President to the fullest, but also needed the support and trust of senior military officials The situation got progressively worse over the next several months (Feb and Mar 93) with senior military officials gaining support in the Congress for not lifting the ban while the press was feeding off the public disagreement between the President and his Joint Chiefs of Staff Secretary Aspin finally appointed a Military Working Group in April, 1993 to develop alternative policy options to meet the President's requirements9 He also commissioned the RAND Corporation to conduct an independent study of "Sexual Orientation and U S Military Policy "10

As expected, the recommendations made by the Military Working Group reflects the views of the Joint Chiefs of Staff. These include restate the policy that homosexuality is inherently incompatible with military service, retain the ban on homosexual behavior, free service members from any obligation to disclose their sexual orientation, and discourage efforts to ferret out gay personnel who were discreet about their homosexuality.<sup>11</sup> The Military Working Group's recommendations were approved by Secretary Aspin and General Powell and briefed to the President and members of Congress in an effort to gain support for approval of a final compromise policy.

On the other hand, the RAND Corporation's 518 page report recommended that the Pentagon adopt a policy that "would consider sexual orientation, by itself, as not germane to determining who may serve in the military."<sup>12</sup> This philosophy is almost the opposite of the Pentagon's official position on the issue. Therefore, it was not made public until late August (when Congress was not in session), a month after President Clinton had announced his "don't ask, don't tell" policy.

### CONGRESSIONAL HEARINGS

Senator Nunn created a stir just before the March 29 start of the hearings by suggesting that the interim arrangements worked out by Congress and the White House to defuse the crisis might serve as a basis for compromise. The Senator said, "I see problems with every direction, from backward to forward to standing still, but I see less problems with the initial compromise worked out by the President and Congress."<sup>13</sup> The panel's ranking Republican, Strom Thurmond, immediately supported Nunn's position and surprised many when he opened the hearings with praise for the gay servicemen, and women who labored under a stigma even as he called for retaining the ban. "The record is replete with instances of dedicated and heroic service by many

gays in the ranks of our Armed Services "<sup>14</sup> However, most of Thurmond's Republican colleagues led opposition to lifting the ban, and hammered away at privacy concerns

On March 31, 1993, the Senate panel's hearings moved to the question that was at the heart of the debate What effect would the presence of openly gay soldiers, sailors and marines have on the ability of the Armed Forces to wage war? The response to this question as expressed by scores of witnesses, ranged from one side of the argument to the other Lawrence J Korb, who served as Assistant Secretary of Defense during the 1980's conceded that cohesion might suffer in the short run, as it did in the decades after President Harry S Truman signed an executive order racially integrating the services But in the long term, unit cohesion, morale and unit effectiveness would not suffer because service members would simply adjust as they have in many other situations requiring change <sup>15</sup> Conversely, William Henderson, an author and veteran who was wounded in combat, challenged Korb's optimistic scenario "There would be, I'm convinced, a degradation of military effectiveness and unit effectiveness," he said, even if senior commanders exerted strong leadership <sup>16</sup> "This issue is far more intractable than race,"<sup>17</sup> Henderson said On May 11, 1993, General Norman Schwarzkopf told the committee "The introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for (its) survival in time of war "<sup>18</sup> The social complexities of the issue were underscored when Marine COL Fred Peck told the committee that one of his sons was homosexual but that he would oppose permitting him to join the military "I know what it would be like for him if he went in and I would be very fearful that his life would be in jeopardy from his own troops,"<sup>19</sup> said Peck

The arguments continued to flow persuasively on both sides of the issue Although the arguments against gays serving openly somewhat dominated the hearings, a survey conducted by

the author of this essay concluded that overall, openly gay service members serving on active duty do not adversely affect unit effectiveness unless homosexual conduct is involved. The survey questioned 20 officers (previous commanders), 20 noncommissioned officers (NCOs), and 15 lower ranking enlisted service members. While the majority of the officers (ages 40-45) would prefer not to deal with having an openly gay person in his/her unit, most agreed that unless there were incidents of homosexual conduct, homosexual harassment, touching or bodily contact, unit morale and effectiveness would not significantly be degraded. In other words, as long as the gay service member kept his/her sexual orientation private, performed the job up to standard, and did not engage in homosexual conduct, there would be no major adverse affect on unit morale. The NCOs on the other hand were not as forgiving as the officers. Most NCOs believe that homosexuality and military service are not compatible, and gay service members would somewhat negatively affect unit morale and effectiveness. The young enlisted men and women surveyed, were the most liberal of the three groups questioned. Most had absolutely no problem with serving in close quarters with gay service members (fox holes, berthing areas, open bay barracks etc), as long as they were not propositioned, harassed or touched. The themes that prevailed throughout the survey are "don't ask, don't tell, don't touch, and do your job."<sup>20</sup>

### **SEEKING AGREEMENT**

Back on Capital Hill and in the White House, bureaucratic politics continued in its rarest form. Convinced that Congress would block any effort by the President to eliminate the ban on gays, Rep Barney Frank--one of two openly gay members of Congress--shook up the debate by proposing a variation on the "don't ask, don't tell compromise." Frank said in a news conference on May 18 that the policy on gays and lesbians in the military should be "don't ask, don't tell, don't listen and don't investigate."<sup>21</sup> In essence, homosexuals in the military would be allowed to



be open about their orientation--but only when they were off duty and off base. The compromise was criticized as a capitulation by some gay leaders and as unacceptable by conservatives.

Clinton took an increasingly conciliatory tone on the issue. In a town meeting televised by CBS on May 27, Clinton emphasized that he had no intention of changing the Uniform Code of Military Justice. It prohibited sodomy, whether homosexual or heterosexual. "You should be able to acknowledge, if asked, that you are homosexual as long as you don't engage in homosexual conduct,"<sup>22</sup> Clinton added. Nunn flatly rejected Clinton's proposal that homosexuals be permitted to acknowledge their sexual orientation so long as they did not engage in prohibited acts. The Senator said, "A gay soldier could disrupt his platoon just as severely by declaring his sexual orientation as by engaging in homosexual conduct--and as much by making that orientation known off base as by doing so on base."<sup>23</sup> But Nunn agreed with Frank, and Clinton that military officials should not spend their time hunting down gays.

### **THE PRESIDENT'S DECISION**

After intense efforts between the President, Congress, and the Joint Chiefs of Staff to reach a compromise on the issue, Clinton announced his long promised policy in the form of a Pentagon directive.<sup>24</sup> The policy would have gone into effect on October 1, however, it was delayed by court rulings. The policy falls far short of the President's original goal of allowing homosexuals to serve openly. Instead, it bans homosexual conduct and tolerates gay service members only if their orientation remains covert. The policy did provide that recruits would no longer be questioned about homosexuality when applying to enter the Armed Services (don't ask). But once in uniform, gay service members are expected to keep their homosexuality private (don't tell). Otherwise, they are presumed to be engaging or likely to engage in homosexual acts, and thus subject to dismissal.

In what was billed as an important effort to mitigate the past climate of fear and hostility, commanders were expected to take a more relaxed attitude toward undeclared homosexuality. Instead of launching witch hunts to find homosexuals and expel them from the military, they were to investigate only when credible evidence of homosexuality was brought to their attention--"don't pursue "

Not content to let the President have the last word, the Senate Armed Services Committee wrote Nunn's own tougher-toned version of the ban (same message, however) into its fiscal 1994 Defense Authorization Bill (HR 2401). An identical provision was adopted by the House Armed Services Committee in the companion House bill. The provision withstood challenges on the floor of both chambers and became law when the President signed the Defense Authorization Bill on November 30.<sup>25</sup>

### **THE COURTS WEIGH IN**

Despite the congressional action, the gay ban--and President Clinton's effort to reformulate it -- were left in limbo near the end of the year by a series of court rulings. The most formidable of these involved a ruling against the gay ban by a panel of the U S Court of Appeals for the District of Columbia. In a unanimous decision, a three-judge panel headed by Chief Judge Mikva ordered the Navy to give an officer's commission to Joseph Steffan. After disclosing that he was gay, Steffan was forced to resign as a midshipman in 1987, just six weeks before he would have graduated from the U S Naval Academy. He was accused of no homosexual conduct beyond revealing his sexual orientation. Judge Mikva's opinion was a legal broadside against the fundamental premise of both the old and new policies. Noting that Steffan was accused of no misconduct, the judge ruled that the policy that drove the midshipman from the service was based on the assumption that other military personnel would be offended by having to serve with

homosexuals Mikva does not believe the government can discriminate in an effort to avoid the effects of others' prejudices<sup>26</sup> With the broader issue of the military treatment of homosexuals evidently headed to the Supreme Court for resolution, the legal case against homosexuals was strengthened by the language defending the ban which lawmakers wrote in the Defense Authorization Bill

## CONCLUSION

When candidate Clinton made the campaign promise to lift the ban allowing gays to openly serve in the military, it appeared that he was not aware that he did not have the political power or Constitutional authority to unilaterally direct this controversial change in military policy Was it by design that the founding fathers held a great reluctance in placing significant powers exclusively in either the executive, legislative, or judicial branch? If the "Invitation to Struggle" was not inherently contained in the Constitution, perhaps President Clinton could have published his executive order lifting the gay ban without the delay, divisiveness, political posturing, factionalism and compromise which occurred between the executive and legislative branches and embellished by the judicial branch

But the final product which emerged is a classic case of Graham T Allison's Model III -- policy derived as a result of bureaucratic politics and compromise Commander-in-Chief Clinton first had to reconcile matters within his own administration--delay final action for six months while the Defense Department carefully crafted a compromise policy which the senior military, (notably Gen Colin Powell) could live with After commissioning several study groups to analyze the situation and make recommendations (study groups cost approximately 2 3 million), the Defense Department adopted its original bottom-line that homosexuality is not compatible with military service and adversely affects readiness

Meanwhile, Commander-in-Chief Clinton had to deal with an imposing Congress that was exercising its Constitutional authority over the military through Article 1, Section 8-12 ("The Congress shall have power to raise and support armies"<sup>27</sup>) The Congress forced the President to compromise on the issue by threatening to write the existing ban against gays in the military into law, thereby overriding his executive order

Further, the President had to deal with special interests groups like the Gay and Lesbian Legal Defense Network, who contributed over 2 million to his campaign and in return was promised that the ban against gays in the military would be lifted

The good news inherent in this bureaucratic politics paradigm is that all parties—the President, the senior military, the Congress and special interests were eager to compromise and bargain on a policy which best serve their individual agendas The bad news is that the final policy which emerged and written into law was no better, or perhaps worse, than what they started out with

A comparison of both policies reveals some interesting results First, the old policy asked service members to disclose their sexual orientation The new policy does not However, if it becomes known that the service member is gay, he must convince the commanding officer that he will not engage in homosexual acts Otherwise, he is discharged Second, both policies are identical in that they prohibit homosexual acts and marriages Finally, the new policy gives commanders broad discretion to start an investigation if he believes a service member is engaging in homosexual acts This new provision is actually suppose to discourage unworthy investigations or witch hunts However, the opposite is occurring The number of investigations are up by 20 percent since Nov 30, 1993 - the date the new policy went into effect

Sometimes bargaining games produce good products, other times they may not The

nature of this controversial issue permits fundamental disagreement among reasonable men --

Clinton, Powell, Nunn -- concerning what ought to be done. Separate responsibilities laid on the shoulders of these men encouraged differences in perceptions and priorities. But the final policy, whether analyzed as good or bad, was the result of a process that is all-American: a process whose political outcome resulted from intense compromise, coalition, and competition among government leaders who fought for what they thought was in the best interest of the nation.

## NOTES

- 1 Rowland Evans & Robert Novak, *The Brass Dissent*, the Washington Post, Jan 27, 1993, at 19
- 2 Ruth Marcus and Helen Dewar, *Compromise seen on Gays in Military*, The Washington Post, Jan 29, 1993, at 1
- 3 *Transcript of President Clinton's News Conference*, The Washington Post, Jan 30 1993, at 12
- 4 Ibid , at 13
- 5 Letter from Gen Colin Powell to Rep Patricia Schroeder, May 8, 1992, reprinted in Crisis, July/August 1992, at 46
- 6 Comments to members of the Senate Armed Services Committee, reprinted in Washington Times, Jan 25, 1993, at 16
- 7 Newly elected President Clinton said these remarks at his first post-election news conference on November 12, 1992
- 8 Summary Report of the Military Working Group appointed by Les Aspin to develop a new policy to end discrimination on the basis of sexual orientation in the Armed Forces, at 1
- 9 Interview with LTC Cheryl Zadlo, USAF, member of the Military Working Group, revealed that the Working Group consisted of a General Officer representative from each Service plus some 60 officers and civilians who served on the support staff
- 10 The Rand Corporation, a conservative think tank based in Santa Monica, California, specializes in research on military issues
- 11 Summary Report of the Military Working Group, Office, Secretary of Defense, 1 July 1993, at 16
- 12 The RAND Corporation's executive summary of "*Sexual Orientation and U S Military Personnel Policy Options and Assessment*" was reprinted in Harper's Magazine, November 1993, at 26
- 13 Senator Nunn said these remarks at a news conference immediately preceding the March 29 hearings His remarks were reprinted in The Washington Post, March 30, 1993, at 22
- 14 Senator Thurmond, surprised many with his relatively liberal remarks regarding gays serving in the military given in his opening statement during Senate Armed Services Committee hearings

on March 29, 1993, at 31 Senator Thurmond is a conservative Republican from South Carolina

15 Lawrence J Korb is a former Assistant Secretary of Defense for Force Management and Personnel His testimony reflects that allowing openly gay soldiers to serve on active duty would not adversely affect unit cohesion and morale His testimony is found in the Senate Armed Services Committee Congressional testimony, March 31, 1993 at 66

16 William Henderson, an author and combat veteran testified before the Senate Armed Services Committee on April 4, 1993 His testimony is found on page 38 of the Senate Armed Services Committee Record of Congressional Hearings

17 Ibid , at 39

18 General Norman Schwarzkopf said these remarks during his testimony before the Senate Armed Services Committee on May 11, 1993 His testimony is found on page 73 of the Senate Armed Services Committee Record of Congressional Hearings

19 COL Fred Peck's testimony is found on page 86 of the Senate Armed Services Committee Record of Congressional Hearings, May 14, 1993

20 The author of this essay surveyed 53 officers, noncommissioned officers and lower enlisted soldiers regarding their stand on gays serving openly in the military All participants of the survey are presently serving in the Military District of Washington The survey contained 10 questions such as "In your opinion, as the commander, what effect did the policy change have on your unit's morale, readiness, training, and discipline " The results of the survey revealed that commissioned officers and lower enlisted were more tolerant of gays serving openly as long as there were no incidents of homosexual conduct They did not believe homosexuals adversely affect unit readiness NCOs adamantly opposed the issue and believe that homosexuality and military service are not compatible The NCOs in this survey do believe that homosexuals adversely affect units readiness

21 Rep Barney Frank, said these remarks in a news conference on May 18, 1993, reprinted in the Washington Post on May 19, 1993 at 16

22 President Clinton said these remarks in a televised "town hall" meeting on May 27, 1993 Excerpts from the town hall transcription are found in the Washington Times, May 29, 1993 at 16

23 Senator Nunn said these remarks in a Senate speech hours after President Clinton's televised "town hall" meeting on CBS, May 27, 1993 Remarks are reprinted in CQ Almanac, May 1993, at 459

24 Department of Defense Directive 9001 8, October 1, 1993, specifies the new policy on gays serving in the military

25 The House adopted the conference report November 15 by a vote of 273-135 The Senate approved the report November 17 by a vote of 77-22, clearing the measure for the President The President signed the fiscal 1994 Defense Authorization Bill (HR2401) into law on November 30 (PL103-160)

26 Chief Judge Abner J Mikva ordered the Navy to give an officer's commission to Joseph C Steffan Mikva was head of a panel of the U S Court of Appeals for the District of Columbia Mikva wrote that "the Constitution does not allow government to subordinate a class of persons simply because others do not like them The government cannot discriminate in an effort to avoid the effects of others' prejudices "

27 Article 1, Section 8, (12) of the Constitution of the United States indicates that "The Congress shall have power to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years "



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